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14 and OTTOMOTTO LLC

15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 SAN FRANCISCO DIVISION
18

19 WAYMO LLC,
20 Plaintiff,
21 v.
22 UBER TECHNOLOGIES, INC.,
OTTOMOTTO LLC; OTTO TRUCKING LLC,
23 Defendant.
24

Case No. 3:17-cv-00939-WHA

**OPPOSITION TO WAYMO'S
MOTION *IN LIMINE* NO. 4**

Date: July 26, 2017

Time: 8:00 a.m.

Ctrm: 8, 19th Floor

Judge: The Honorable William Alsup

Trial Date: October 10, 2017

1 Waymo wants to tell the jury that Uber misappropriated the “downloaded materials” that
2 Waymo claims contain its trade secrets. But then Waymo conveniently wants to prevent Uber
3 from telling the jury that Uber looked for but did not find any of the “downloaded materials” at
4 Uber. Waymo is well aware that Uber thoroughly inspected its computer systems and found no
5 evidence of Uber ever having received “Downloaded Materials,”—the definition of which, of
6 course, is not coextensive with the 14,000 files Levandowski downloaded just as it is not the
7 same thing as a trade secret. Waymo wants to prevent the jury from finding out that those
8 searches for anything that could remotely look like it came from Google—regardless of whether
9 it was a trade secret—were conducted by highly skilled forensics experts, were repeated with
10 search terms that Waymo selected, and were done with enormous rigor. Waymo also does not
11 want Uber to tell the jury that Waymo’s lawyers have conducted ten separate physical inspections
12 of Uber engineers’ computers and workstations and of all four of Uber’s facilities where LiDAR
13 work occurs, and have found nothing.

14 Waymo understands the force of this evidence and its implications for its case, because
15 there is no question it is not only relevant, but highly probative. Indeed, if these searches and
16 inspections had uncovered any of the “downloaded materials,” let alone any actionable trade
17 secrets, that finding would be the first sentence in Waymo’s opening statement. The opposite
18 side of that coin is equally relevant.

19 Accordingly, Waymo wants to exclude this highly probative evidence—or improperly
20 introduce evidence of the Court’s preliminary injunction along with it—because its evidence of
21 misappropriation against Uber is weak and Waymo is now desperate to prevent Uber from putting
22 on its defense. None of Waymo’s arguments, however, come close to warranting exclusion of
23 these critical facts and depriving Uber of its ability to defend against Waymo’s allegations that
24 Uber stole Waymo’s trade secrets. Below, we briefly summarize the evidence that Uber would
25 seek to introduce at trial and then address Waymo’s three arguments.

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I. THERE IS SIGNIFICANT ADMISSIBLE EVIDENCE PERTAINING TO UBER’S EFFORTS TO LOCATE THE ALLEGED “DOWNLOADED MATERIALS”

The evidence showing that Uber does not have—and has never had—the alleged “downloaded materials” includes the following facts:

1. Uber’s forensics expert looked for the “downloaded files” in Uber’s servers and computers using search terms (including some provided by Waymo), and also conferred with Waymo’s forensics consultant for search suggestions. None of the “downloaded files” were found. There were a few unrelated Google documents found and they were returned to Waymo.
2. Uber asked Anthony Levandowski to return any “downloaded materials” he might have to Uber’s counsel, who would provide them to Waymo’s lawyers. When he did not do so, he was fired.
3. Uber has allowed Waymo lawyers and experts to personally inspect four of its facilities for dozens of cumulative hours over ten separate visits and they have found nothing. During those inspections, certain Uber computers and devices that were requested by Waymo were made available for review.

These straightforward facts are essentially undisputed and can be carefully presented to the jury. Indeed, Uber has offered Waymo the opportunity to present these facts to the jury via stipulation. Waymo has indicated that the offer is premature because of this pending motion. (González Decl. ¶ 2.) If Waymo rejects the offer to stipulate to these and other facts, we anticipate that various witnesses would testify about these facts, including Uber’s forensics and industry experts, as well as Angela Padilla, Uber’s Associate General Counsel for Litigation & Employment. Waymo, of course, remains free to challenge the import of these facts through cross examination and the presentation of any additional facts it deems appropriate.

II. NONE OF WAYMO’S THREE ARGUMENTS WARRANT EXCLUDING THIS IMPORTANT EVIDENCE

First, Waymo argues that allowing the jury to hear about Waymo’s and Uber’s efforts to find the “downloaded materials” would “open the door” to Waymo saying that these efforts were

1 in response to Orders from this Court. No such door would be opened. Uber intends to present
2 facts that bear upon *what* was done to locate the downloaded materials at Uber, not *why* Uber
3 undertook those efforts. The latter fact is irrelevant. The relevant fact is that both Waymo and
4 Uber thoroughly investigated whether “downloaded materials” were located at Uber and none
5 were found. There is no lawful basis for precluding Uber from presenting this fact to the jury.

6 *Second*, Waymo claims that because certain employee questionnaires have not been
7 produced, Uber should not be able to introduce *any* of the evidence identified above (which is
8 separate and apart from the questionnaires themselves). That argument is simply wrong as a
9 matter of law. Uber does not need to effect a waiver over privileged material it has no intention
10 of introducing at trial (attorney-client privileged and work-product protected interviews of its
11 employees) in order to show the jury separate non-privileged facts identified above. And even if
12 Uber’s reliance on its forensic experts’ search for “downloaded materials” and Waymo’s
13 inspections could be said to be a privilege waiver (it is not), that waiver would not extend to the
14 completely different subject of employee and agent interviews. *See Trireme Med., LLC v.*
15 *Angioscore, Inc.*, No. 14-CV-02946-LB, 2016 WL 4191828, at *2 (N.D. Cal. Aug. 9, 2016)
16 (“[W]aiver on particular topics did not yield broad disclosure of entirety of patent prosecution
17 material”) (internal quotation marks & citation omitted).

18 Moreover, the authority cited by Waymo contradicts its overbroad request to exclude any
19 argument, testimony, or evidence about efforts taken in response to the Court’s Preliminary
20 Injunction Order. (Dkt. 913 at 1.) The court in *Universal Electronics* denied a motion *in limine*
21 to exclude evidence or argument regarding why the plaintiff had changed the inventorship of a
22 patent as “overly broad” because the plaintiff’s witness answered some questions about the
23 change, while asserting privilege for other questions. *Universal Elecs., Inc. v. Universal Remote*
24 *Control, Inc.*, No. SACV 12-00329 AG (JPRx), 2014 WL 8096334, at *8 (C.D. Cal. Apr. 21,
25 2014). Here, Uber has provided extensive, non-privileged information on its efforts related to the
26 Preliminary Injunction Order to the Court, the Special Master, and Waymo. (*E.g.*, Dkt Nos. 715,
27 762, 967.) There is no surprise here, and no basis to exclude argument, testimony, or evidence of
28 such non-privileged efforts.

1 Further, even if such a waiver were required (and it is not), Waymo admits the only two
2 cases that it cites deal with preclusion where a party attempts to waive privilege after the close of
3 discovery. (Mot. at 1 (citing *Universal Elecs.*, 2014 WL 8096334, at *8; *Edward Lowe Indus.,*
4 *Inc. v. Oil-Dri Corp. of Am.*, No. 94-C-7568, 1995 WL 609231, at *5 (N.D. Ill. Oct. 13, 1995).)
5 Discovery is not closed in this case.

6 *Third*, Waymo claims the “the only individuals” with knowledge of the facts set forth
7 above would be MoFo lawyers. That is wrong. As noted above, other witnesses, including
8 Uber’s forensics expert, will testify about searches that were done and communications with
9 Waymo’s experts, who also did not locate any downloaded materials at Uber. In addition, Angela
10 Padilla and other Uber witnesses who were present at the inspections can testify about the on-site
11 inspections that were done by Waymo at Uber’s offices and at MoFo’s offices. Moreover, even if
12 a MoFo lawyer testified about a fact—such as “I was at MoFo when two lawyers for Waymo
13 came to look at one of Uber’s computers in our office”—that would not warrant preclusion and
14 would not impact this Court’s ruling regarding MoFo’s work on the Ottomotto transaction.

15 For all of these reasons, Waymo’s motion to exclude any argument, testimony, or
16 evidence regarding Defendants’ efforts during the litigation to try to locate the “downloaded
17 materials.” (Dkt. 913 at 2.) Waymo’s motion should be denied.

18 Dated: July 21, 2017

MORRISON & FOERSTER LLP

19
20 By: /s/ Arturo J. González
Arturo J. González

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22 Attorneys for Defendants
23 UBER TECHNOLOGIES, INC.
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